

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

CLIFFORD GOODWIN,) CASE NO.: C05-1723-JCC
Petitioner,)
v.) REPORT AND RECOMMENDATION
DOUG WADDINGTON,)
Respondent.)

I

Petitioner Clifford Goodwin proceeds *pro se* in this 28 U.S.C. § 2254 action. He challenges his 2002 conviction of rape in the first degree with a deadly weapon enhancement. (Dkt. 5.) Respondent argues that petitioner failed to properly exhaust a number of his claims and that his exhausted claims lack merit. (Dkt. 14.) Petitioner submitted a reply to respondent's answer. (Dkt. 17.) Having reviewed the record in its entirety, including the state court record, the Court recommends that the petition be denied and this matter dismissed with prejudice.

II

The Washington Court of Appeals summarized the facts surrounding petitioner's conviction and sentence as follows:

In 1998, S.F. was brutally attacked and raped. During the subsequent investigation, police officers recovered certain evidence, including S.F.'s semen-stained underpants, a portion of which, later identified as "GRF 2," was submitted to the Washington State Patrol crime laboratory for deoxyribonucleic acid (DNA) testing. The crime went unsolved and without a primary suspect until 2001, when DNA extracted from a blood sample taken from Goodwin matched the DNA profile of the rapist. Goodwin was charged with first degree rape.

Prior to the scheduled trial date, Goodwin's trial counsel requested a continuance so that a lab in California, named Technical Associates, Inc., could analyze the DNA testing performed at the Washington State Patrol crime lab. The trial court found good cause for the continuance, noting, "obviously it would be akin to malpractice on the part of any defense attorney to not investigate the DNA in the way [defense counsel] had indicated that she wishes to do so." Trial was rescheduled for March 1, 2002.

Several additional trial continuances were thereafter granted so that the defense DNA expert could complete its review of the procedures employed and documentation prepared by the Washington State Patrol crime lab. On each occasion, the continuance was granted over the personal objection of Goodwin.

On March 29, 2002, Goodwin's trial counsel moved for another continuance to allow for independent DNA testing by Technical Associates, Inc. The motion was granted, once again over Goodwin's personal objection, and trial was eventually reset for June 24, 2002. Meanwhile, a stipulated order was entered on April 25, 2002 that requested specific items be released to Technical Associates Inc., for examination and testing:

ITEM NUMBER	DESCRIPTION
GRF 1	A piece of fabric from a stain off a shirt (part of item KJZ-13) reported used as a secondary reference same for [S.F.].
GRF 2	A cutting removed from a pair of underpants (part of item KJZ-7) where spermatozoa were previously identified.
	Saliva sample of defendant Clifford Goodwin obtained from the defendant at the Snohomish County jail by Detective Steve Rider, Lynnwood Police Department.

On June 24, Goodwin moved to dismiss the case pursuant to CrR 8.3(b). Goodwin asserted that when Technical Associates, Inc., opened the sealed envelope received from the Washington State Patrol crime laboratory it contained a note indicating the entire sample had been consumed by the crime lab during initial testing. Noting his trial date had been continued numerous times over his personal objection, Goodwin argued the State mismanaged the case by failing to notify him that there was no DNA material from Item GRF 2 available for retesting. The trial court denied the motion for dismissal. At the jury trial that followed, Goodwin was found guilty as charged. This appeal followed.

(Dkt. 16, Ex. 3 at 1-3).

Petitioner appealed to the Washington Court of Appeals. Respondent asserts its inability to locate petitioner's appellate brief. However, respondent notes that only petitioner's first claim in this petition was contained in his petition for review on direct appeal and, therefore, that any additional claims were not properly exhausted through presentation to the Washington Supreme Court.

Petitioner also filed a statement of additional grounds for review in the Washington Court of Appeals:

Additional Ground 1

Ineffective assistance of counsel/violation due process, defense counsel stated she didn't get a hard copy of the DNA independent testing because she would have been required to pass that on to the state. I did request to see the results. I believe independent testing never took place however the notes that were sent to independent lab was duplicated to make authentic. Retesting never done prior to trial. Defense counsel stated it was a matter of her trial strategy.

Additional Ground 2

Ineffective assistance of counsel/defense counsel took part in delaying trial when sent independent lab the notes from state testing to analyze the DNA testing done being uncertain if their should be a retest of the evidence. Defense counsel quoted, "I don't want to ask for that without having any basis." Defense counsel had no knowledge on how to handle the case.

01 (*Id.*, Ex. 2.) The Washington Court of Appeals affirmed petitioner's conviction and sentence.

02 (*Id.*, Ex. 3.)

03 Petitioner moved for reconsideration, presenting the following ground for review:

04 APPELLANT'S RIGHT TO PREPARE A DEFENSE FOR A FAIR TRIAL,
05 GUARANTEED BY WASHINGTON'S DUE PROCESS CLAUSE, ART. I § 3,
06 AND THE 14TH AMENDMENT TO THE U.S. CONSTITUTION, WAS
07 VIOLATED WHEN THE COURT OF APPEALS HELD THE TRIAL COURT DID
08 NOT ABUSE ITS DISCRETION IN DENYING THE CrR 8.3 (b) MOTION TO
09 DISMISS KNOWING THE STATE BREACHED A PRE-TRIAL STIPULATION
10 AND COURT ORDER FOR DISCOVERY, RESULTING IN EGREGIOUS
11 MISMANAGEMENT OF EXCULPATORY EVIDENCE, THUS,
12 PREJUDICIALLY CAUSING APPELLANT RIGHT TO A SPEEDY TRIAL TO
13 BE VIOLATED.

14 (*Id.*, Ex. 4 (supporting citations omitted.)) The Washington Court of Appeals denied his motion.

15 (*Id.*, Ex. 5.)

16 Petitioner petitioned for review with the Washington Supreme Court, raising the following
17 grounds for review:

18 Petitioner's rights to prepare a defense for a fair trial, guaranteed by Washington's
19 due process clause, Art I § 3, and the 14th Amendment to the U.S. Constitution, was
20 violated when the Court of Appeals held the Trial Court did not abuse its discretion
21 when denying the CrR 8.3(b) motion to dismiss contrary to well established law
22 knowing the State breached a pre-trial stipulation and court order resulting in
egregious mismanagement of exculpatory evidence intending to prejudicially cause
Petitioner's right to a speedy trial to be violated[.]

23 (*Id.*, Ex. 6.) The Washington Supreme Court denied the petition. (*Id.*, Ex. 7.) On January 16,
24 2004, the Washington Court of Appeals issued its mandate. (*Id.*, Ex. 8.)

25 Petitioner filed a personal restraint petition on July 9, 2004, raising the following grounds
26 for relief:

27 Petitioner was denied his Sixth Amendment Constitutional Right to Effective

01 Assistance of Counsel when Defense counsel failed to introduce evidence to support
02 her trial strategy.

03 . . .

04 The petitioner's 5th, 6th, and 14th Amendment constitutional right to Due Process
05 was violated when the State withheld exculpatory evidence.

06 . . .

07 Petitioner also asserts that the cumulative effect of these errors also affected the
08 outcome of the trial and therefore denied his right to a fair trial thus, his conviction
09 and sentence is unconstitutional and relief should be granted in part D of this petition.

10 (*Id.*, Ex. 9.) The Washington Court of Appeals denied the petition. (*Id.*, Ex. 10.)

11 In a petition for review, petitioner raised the following grounds:

- 12 A. The petitioner was denied his Sixth Amendment Constitutional Right to
13 effective assistance of counsel when counsel failed to introduce evidence to
14 support her trial strategy.
- 15 B. The petitioner's Fifth, Sixth, and Fourteenth Amendment Constitutional right
16 to Due Process was violated when the State Withheld exculpatory evidence.

17 (*Id.*, Ex. 11.) The Washington Supreme Court denied review. (*Id.*, Ex. 12.) The Washington
18 Court of Appeals issued a certificate of finality on March 16, 2005. (*Id.*, Ex. 13.)

19 Petitioner filed a second personal restraint petition directly in the Washington Supreme
20 Court, raising the following grounds for review:

21 GROUND ONE:

22 Petitioner's fifth amendment rights, as applied to the states through the
23 fourteenth amendment, to remain silent at trial, to be convicted solely on the basis of
24 evidence adduced at trial, and to due process of law were violated when the state used
25 Det. Rider, in violation of ER 615, to comment on Mr. Goodwin's in-court behavior,
26 and then relied on that "testimony" during closing argument.

01 GROUND TWO:

02 Petitioner's attorney rendered ineffective assistance of counsel, in violation of
03 the sixth amendment, when she failed to object to the state's use of Detective Rider's
04 presence in the courtroom to violate Mr. Goodwin's fifth amendment rights as stated
05 above.

06 (Id., Ex. 14.) The Washington Supreme Court dismissed the petition. (Id., Ex. 15.) The
07 Washington Supreme Court subsequently denied petitioner's motion to modify and issued its
08 certificate of finality on June 8, 2005. (Id., Exs. 16-18.)

09 III

10 Petitioner now raises the following grounds for habeas relief:

11 GROUND ONE: Due process violation, Gross Governmental Mismanagement in
12 handling and testing the DNA evidence which breached a stipulated court order and
13 caused numerous trial continuances over defendant's objections violating his right to
14 a speedy trial.

15 GROUND TWO: Petitioner's Sixth Amendment right to effective assistance of
16 counsel was violated when defense counsel failed to independently test all DNA
17 evidence.

18 GROUND THREE: Conviction obtained by the unconstitutional failure of the state
19 to disclose all evidence exculpatory to the defendant.

20 GROUND FOUR: Prosecutorial misconduct deprived defendant of his right to a fair
21 trial; defense counsel was ineffective for failing to object.

22 (Dkt. 17.)¹ The Court finds no basis for an evidentiary hearing. For the reasons described below,
the Court concludes that petitioner's claims lack merit.

1 Respondent construed petitioner's habeas petition to contain additional, expanded
grounds for review. (See Dkt. 1 and Dkt. 14 at 7-8.) However, in his reply, petitioner clarified
that his grounds for review are limited to those delineated above. (See Dkt. 17.)

Exhaustion of State Remedies

“An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that . . . the applicant has exhausted the remedies available in the courts of the State.” 28 U.S.C. § 2254(b)(1)(A). To exhaust state remedies, a petitioner must present each of his claims to the state’s highest court. *O’Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999). A petitioner must “alert the state courts to the fact that he was asserting a claim under the United States Constitution.” *Hiivala v. Wood*, 195 F.3d 1098, 1106 (9th Cir. 1999) (citing *Duncan v. Henry*, 513 U.S. 364, 365-66 (1995)). “The mere similarity between a claim of state and federal error is insufficient to establish exhaustion.” *Id.* (citing *Duncan*, 513 U.S. at 366). “Moreover, general appeals to broad constitutional principles, such as due process, equal protection, and the right to a fair trial, are insufficient to establish exhaustion.” *Id.* (citing *Gray v. Netherland*, 518 U.S. 152, 162-63 (1996)).

Pursuant to RCW 10.73.090, no petition or motion for collateral attack on a judgment and sentence in a criminal case may be filed more than a year after the judgment becomes final. Additionally, if the state court expressly declined to consider the merits of a ground based on an independent and adequate state procedural rule, or if an unexhausted ground would now be barred from consideration by the state court based on such a rule, a petitioner must demonstrate a fundamental miscarriage of justice, or cause, *i.e.* some external objective factor that prevented compliance with the procedural rule, and prejudice, *i.e.* that the claim has merit. *See Coleman v. Thompson*, 501 U.S. 722, 735 n.1, 749-50 (1991); *Harris v. Reed*, 489 U.S. 255, 263 (1989).

Respondent argues that petitioner failed to exhaust the “speedy trial” aspect of his first ground for relief and the entirety of his fourth ground for relief, and that both claims are now

01 procedurally barred. Petitioner asserts that he properly exhausted all of his claims.

02 It is questionable whether petitioner presented his speedy trial claim as a federal
03 constitutional violation in either his motion for reconsideration to the Washington Court of
04 Appeals or his petition for review in the Washington Supreme Court. (Dkt. 16, Exs. 4 & 6.)²
05 While expressly casting the evidence mismanagement aspect of this ground for relief in both
06 federal and state terms, petitioner points solely to state law in addressing the alleged speedy trial
07 violation. (*Id.*) However, because petitioner alleges evidence mismanagement resulted in the
08 speedy trial violation, the Court considers these intertwined claims exhausted and appropriately
09 addressed as a single claim on the merits.

10 Respondent does not dispute that petitioner raised his fourth ground for relief before the
11 Washington Supreme Court in his second personal restraint petition. (*Id.*, Ex. 14.) Instead,
12 respondent argues that, in first raising the argument in the supreme court, petitioner deprived the
13 Washington Court of Appeals the opportunity to rule on the claim. However, the Court also finds
14 that petitioner properly exhausted his fourth ground for relief.

15 Washington Rules of Appellate Procedure confer on the Washington Supreme Court and
16 Washington Court of Appeals original concurrent jurisdiction in personal restraint proceedings in
17 which the death penalty has not been decreed. RAP 16.3(c). While the supreme court ordinarily
18 exercises its jurisdiction by transferring the petition to the court of appeals, *see* RAP 16.3(c), in
19 this case, the supreme court decided to rule on the petition. (Dkt. 16, Ex.15.) Accordingly,

20
21 ² Respondent asserts that this claim was presented as a federal constitutional claim in the
22 Washington Court of Appeals, but not the Washington Supreme Court. However, the
undersigned finds no material difference between these two petitions warranting such a conclusion.
(*See* Dkt. 16, Exs. 4 & 6.)

01 because Washington State’s highest court considered the merits of this claim, it was properly
02 exhausted and is appropriate for this Court’s review. *See Ylst v. Nunnemaker*, 501 U.S. 797, 801
03 (1991) (“If the last state court to be presented with a particular federal claim reaches the merits,
04 it removes any bar to federal-court review that might otherwise have been available.”); *Casey v.*
05 *Moore*, 386 F.3d 896, 916 n.18 (9th Cir. 2004) (“Of course, a claim is exhausted if the State’s
06 highest court expressly addresses the claim, whether or not it was fairly presented.”) (citing
07 *Castille v. Peoples*, 489 U.S. 346, 351 (1989)).

Merit of Petitioner's Claims

This Court’s review of the merits of petitioner’s claims is governed by 28 U.S.C. § 2254(d)(1). Under that standard, the Court cannot grant a writ of habeas corpus unless a petitioner demonstrates that he is in custody in violation of federal law and that the highest state court decision rejecting his grounds was either “contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.” 28 U.S.C. § 2254(a) and (d)(1). The Supreme Court holdings at the time of the state court decision will provide the “definitive source of clearly established federal law[.]” *Van Tran v. Lindsey*, 212 F.3d 1143, 1154 (9th Cir. 2000), *overruled in part on other grounds by Lockyer v. Andrade*, 538 U.S. 63 (2003). A state-court decision is contrary to clearly established precedent if it ““applies a rule that contradicts the governing law set forth in” a Supreme Court decision, or ““confronts a set of facts that are materially indistinguishable” from such a decision and nevertheless arrives at a different result. *Early v. Packer*, 537 U.S. 3, 8 (2002) (quoting *Williams v. Taylor*, 529 U.S. 362, 405-406 (2000)).

22 | / / /

01 A. Evidence Mishandling

02 Petitioner's first and third grounds for relief raise due process violations stemming from
03 the State's alleged mishandling of the evidence, and a resulting delay in petitioner's trial.³

04 Respondent argues that petitioner fails to show any prejudice resulting from the alleged
05 mishandling of the evidence.

06 On direct appeal, the Washington Court of Appeals disagreed with petitioner's contention
07 that the State's failure to notify him regarding insufficient testing material constituted
08 governmental mismanagement:

09 Our review of the record indicates that the State's actions were not so
10 egregious as to warrant dismissal of the rape charge against Goodwin under
11 CrR8.3(b). While it is true, as Goodwin argues, that actions of the employees of the
12 crime lab are considered actions of the State, State v. Woods, 143 Wn.2d 561, 583,
13 23 P.3d 1046 (2001), there is no showing that those actions with respect to handling
14 of Item GRF 2 were unreasonable. Goodwin has not alleged, much less established,
15 that the State violated any court-ordered obligations or rules of discovery. Nor is
16 there anything to indicate that the State made assurances regarding the possible
17 retesting of GRF 2. As the State points out, any delay resulting from the fact that
18 GRF 2 could not be retested by Technical Associates, Inc., cannot fairly be attributed
19 solely to the State. If there was any lack of diligence, it was shared equally by
20 Goodwin and the State. Goodwin could have inquired if there was sufficient DNA
21 material from GRF 2 to be retested long before March 29, but didn't. Moreover, it
22 appears Goodwin initially refused to provide a sample of his saliva for DNA testing
material from GRF 2 to be retested long before March 29, but didn't. Moreover, it
appears Goodwin initially refused to provide a sample of his saliva for DNA testing
purposes as specifically ordered by the trial court on April 25. The State complied
with Goodwin's request as best it could. Upon learning that GRF 2 no longer
contained a viable DNA sample, the State immediately sent the remaining portion of
S.F.'s underpants with approximately half of the original semen stain still intact to

19 ³ Petitioner's third ground for relief asserts generally an "unconstitutional" failure to
20 disclose exculpatory evidence. However, petitioner clarifies in his reply that this ground for relief
is associated with what respondent construed as separate alleged due process violations. (See Dkt.
21 17 at 4 and Dkt. 14 at 7.) Also, both this ground and petitioner's first ground for relief concern
an alleged insufficient amount of evidence for testing. (See Dkt. 1 at 5A and 6.) Accordingly, like
22 respondent, the Court construes these grounds for relief as both asserting due process violations
associated with the State's alleged mishandling of the evidence.

01 Technical Associates Inc., for testing. Therefore, the State's actions did not amount
 02 to misconduct.

03 Even assuming that the State's actions constituted mismanagement, dismissal
 04 would not be appropriate. Goodwin, citing State v. Michielli, 132 Wn.2d 229, 937
 05 P.2d 587 (1997), argues that the State's actions might have forced him into waiving
 06 his speedy trial rights. Michielli, however, is a "Hobson's Choice" case, inapplicable
 07 here. Unlike the situation inMichielli, there is no showing that Goodwin was unfairly
 08 or impermissibly prejudiced. No new facts were interjected in to the proceeding as
 a result of the delay in obtaining Technical Associates Inc.'s DNA test results. [We
 note that Technical Associates Inc., was able to conduct an independent DNA test
 using the remaining portion of the stain on S.F.'s underpants and its results matched
 those reached by the Washington State Patrol Crime laboratory.] The record shows
 that Goodwin received, by all accounts, a fair trial. Under the circumstances we find
 no manifest abuse of discretion[.]

09 (Dkt. 16, Ex. 3 at 4-5 (internal footnote included in text.))

10 The court also addressed petitioner's claim that the state withheld exculpatory evidence
 11 in addressing his first personal restraint petition:

12 Goodwin next contends that his constitutional rights were violated when the
 13 State withheld exculpatory evidence. Due process requires that criminal defendants
 14 be given a meaningful opportunity to present a complete defense. To comport with
 15 due process, the prosecutor has a duty to preserve material exculpatory evidence for
 16 use by the defense. However, there is no "absolute duty to retain and to preserve all
 17 material that might be of conceivable evidentiary significance in a particular
 prosecution." To be material and exculpatory, the evidence's exculpatory value must
 have been apparent before the evidence was destroyed and must be of such a nature
 that comparable evidence could not be reasonably obtained. If the evidence is only
 potentially useful, the failure to preserve it does not deny due process unless the State
 acted in bad faith.

18 Goodwin argues that the State failed to preserve enough of the evidence
 19 collected for complete and accurate DNA testing. There is no showing that these
 20 items had any exculpatory value. As previously noted, Goodwin does not dispute that
 his DNA was extracted from a semen stain found on the rape victim's underwear.
 This evidence alone is compelling. Nor has Goodwin attempted to explain why
 additional DNA testing was necessary to ensure he received a fair trial. There was no
 21 due process violation.

22 (Dkt. 16, Ex. 10 at 3-4 (internal footnotes containing citations omitted.))

Petitioner fails to show that the state court decisions were contrary to, or involved an unreasonable application of, clearly established federal law. As argued by respondent, and as found by the state courts, petitioner fails to establish any prejudice resulting from the alleged mishandling of the evidence by the State. Indeed, testing ultimately conducted by the independent lab confirmed the State lab's conclusion that the semen on the victim's underwear belonged to petitioner. (*See, e.g.*, Dkt. 16, Ex. 20 at 303 and 344 (transcript of proceedings reflecting that the Washington State Patrol lab and Technical Associates Inc. reached the same results in testing the evidence.)) Therefore, the Court recommends that petitioner's first and third grounds for relief be denied.

B. Ineffective Assistance of Counsel

The Sixth Amendment guarantees a criminal defendant the right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Courts evaluate claims of ineffective assistance of counsel under the two-prong test set forth in *Strickland*. Under that test, a defendant must prove that (1) counsel's performance fell below an objective standard of reasonableness and (2) a reasonable probability exists that, but for counsel's error, the result of the proceedings would have been different. *Id.* at 687-694.

When considering the first prong of the *Strickland* test, judicial scrutiny must be highly deferential. *Id.* at 689. There is a strong presumption that counsel's performance fell within the wide range of reasonably effective assistance. *Id.* The Ninth Circuit has made clear that “[a] fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time.”” *Campbell v. Wood*, 18 F.3d 662,

01 673 (9th Cir. 1994) (quoting *Strickland*, 466 U.S. at 689).

02 The second prong of the *Strickland* test requires a showing of actual prejudice related to
 03 counsel's performance. The reviewing court need not address both components of the inquiry if
 04 an insufficient showing is made on one component. *Strickland*, 466 U.S. at 697. Furthermore,
 05 if both components are to be considered, there is no prescribed order in which to address them.

06 *Id.*

07 Here, petitioner alleges ineffective assistance of counsel through his trial counsel's failure
 08 to independently test all DNA evidence (ground 2), and to object to the testimony of a detective
 09 as to his in-court behavior (part of ground 4). Respondent counters that petitioner's trial
 10 counsel's performance was objectively reasonable.

11 In considering petitioner's second ground for relief, the Washington Court of Appeals held
 12 as follows:

13 [Goodwin] argues that he was denied his right to effective assistance of
 14 counsel when counsel failed to introduce sufficient evidence to support the defense
 15 theory of the case. "The purpose of the requirement for effective assistance of
 16 counsel is to ensure a fair and impartial trial." In Washington, the Strickland test is
 17 used for determining the effectiveness of counsel. To satisfy this two-pronged test,
 18 a defendant bears the burden of proving both that trial counsel's performance was
 19 deficient and that the deficiency prejudiced the defense. In applying the test, courts
 20 indulge in a strong presumption that counsel's performance was effective. The
 21 presumption of counsel's effectiveness can be overcome, however, by showing
 22 counsel failed to conduct appropriate investigations.

23 "Failure to investigate or interview witnesses, or to properly inform the court
 24 of the substance of their testimony, is a recognized basis upon which a claim of
 25 ineffective assistance of counsel may rest." The defendant must show in the record
 26 the absence of legitimate or tactical reasons for counsel's conduct.

27 Goodwin points out that certain items processed or found during the rape
 28 investigation, including a strand of hair and vaginal swabs, were never submitted for
 29 DNA testing. Because defense counsel emphasized the failure by the State to test the

evidence, Goodwin argues his trial counsel should have had the items tested. This claim of deficient performance is too conclusory and speculative to establish ineffective assistance of counsel.

There is no showing that trial counsel's performance was deficient, let alone that any deficiency prejudiced Goodwin. “[D]eficient performance is not shown by matters that go to trial strategy or tactics.” By employing these tactics, defense counsel was able to call into question the adequacy of the police investigation and the strength of the State’s case with little or no risk to Goodwin. After all, Goodwin acknowledges that the semen stain found on the rape victim’s underwear matched his own DNA. At defense counsel’s request, a DNA expert was hired to conduct an independent DNA test of the stain. The independent test results matched those reached by the Washington State Patrol crime laboratory. Goodwin has not explained why additional testing would likely have changed the outcome of his trial. Nothing suggests that someone else’s DNA would be found on the evidence Goodwin now claims should have been tested.

(Dkt. 16, Ex. 10 at 2-3 (internal footnotes containing citations omitted.)) The Washington Supreme Court further addressed this claim:

[Mr. Goodwin] contends that his trial counsel was ineffective in emphasizing the State’s failure to have certain items tested for DNA, while counsel herself failed to have those items tested. But as the Acting Chief Judge [of the Washington Court of Appeals] noted, the victim’s semen-stained underpants were tested and found to contain DNA matching Mr. Goodwin’s. Mr. Goodwin provides no record or other materials suggesting that additional items processed or found during the investigation, including a strand of hair and vaginal swabs, would have pointed to another suspect. There was thus no reason for counsel to risk having those items tested rather than simply to call into question the adequacy of the State’s investigation and the strength of its case.

Contrary to Mr. Goodwin’s argument, this case is not similar to *Alcala v. Woodford*, 334 F.3d 862 (9th Cir. 2003). There, counsel asserted an alibi defense but failed to present witnesses who could definitely say that the defendant was at another location at the time of the crime. One person that could have so stated was not called to testify. The defendant thus showed that counsel failed to present available exculpatory evidence. Mr. Goodwin makes no such showing here.

(*Id.*, Ex. 12 at 1-2.)

Petitioner fails to show that the state court decisions addressing his second ground for

01 relief were contrary to, or involved an unreasonable application of, clearly established federal law.
02 As found by the state courts and as argued by respondent, petitioner fails to show that his trial
03 counsel's performance fell below an objective standard of reasonableness. As such, the Court
04 recommends that petitioner's second ground for relief be denied.

05 With respect to the ineffective assistance of counsel claim in petitioner's fourth ground for
06 relief, the Washington Supreme Court held as follows:

07 Mr. Goodwin's claims both stem from the testimony of a detective who was
08 present in the courtroom during trial. The victim said that her assailant was left-
09 handed. The detective testified that, in the course of the trial, he observed Mr.
10 Goodwin use his left hand to write and perform other tasks. He also said that, when
11 the victim testified that her assailant was left-handed, Mr. Goodwin put his pen down
and pulled his left hand off of the table. Mr. Goodwin argues that the prosecutor
committed misconduct in presenting this testimony and in referring to it in closing
argument. And he contends that his trial counsel was ineffective in not objecting to
it.

12 But even assuming, without deciding, that this evidence was improper, Mr.
13 Goodwin must demonstrate that he was actually and substantially prejudiced by
14 constitutional error or that nonconstitutional error inherently resulted in a complete
15 miscarriage of justice. *In re Lord*, 123 Wn.2d 296, 303, 868 P.2d 835 (1994). He
16 does not do so. Mr. Goodwin complains that the detective's testimony attributed to
17 him the "same rare trait" of left-handedness that the perpetrator possessed. But
properly admitted evidence also attributed to Mr. Goodwin a far rarer trait: the
perpetrator's DNA. Mr. Goodwin does not show that, in light of all of the evidence,
the detective's testimony actually and substantially prejudiced him or resulted in a
complete miscarriage of justice.

18 (Dkt. 16, Ex. 15 at 1-2.) Again, petitioner fails to show that this decision was contrary to, or
19 involved an unreasonable application of, clearly established federal law. As found by the
20 Washington Supreme Court, in light of the other evidence before the court – including DNA
21 evidence found on the victim's underwear, petitioner fails to show that any prejudice resulted from
22 his trial counsel's failure to object to the detective's testimony. Therefore, the Court also

01 recommends that the portion of petitioner's fourth ground for relief alleging ineffective assistance
02 of counsel be denied.

03 C. Prosecutorial Misconduct

04 Finally, petitioner alleges that prosecutorial misconduct with respect to the above-
05 described testimony of the detective deprived him of his right to a fair trial (part of ground 4).
06 Prosecutorial misconduct is limited to the narrow issue of whether the conduct affected the jury's
07 ability to judge the evidence fairly, and therefore violated the due process right to a fundamentally
08 fair trial. *See Thompson v. Borg*, 74 F.3d 1571, 1576 (9th Cir. 1996). Here, as indicated above,
09 the Washington Supreme Court held that, in light of all of the evidence in this case – including
10 DNA evidence found on the victim's underwear, petitioner failed to show that the detective's
11 testimony "actually and substantially prejudiced him or resulted in a complete miscarriage of
12 justice." (Dkt. 16, Ex. 15 at 1-2.) As with the preceding claims, the Court finds that petitioner
13 fails to show this conclusion is contrary to, or an unreasonable application of, clearly established
14 federal law, and recommends that the remaining portion of petitioner's fourth ground for relief
15 also be denied.

16 IV

17 For the reasons described above, petitioner's habeas petition should be denied and this
18 action dismissed with prejudice. A proposed Order of Dismissal With Prejudice accompanies this
19 Report and Recommendation.

20 DATED this 13th day of April, 2006.

21 
22 Mary Alice Theiler
United States Magistrate Judge